JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Justice Joyce L. Kennard, Chair
Heather Anderson, Senior Attorney, 415-865-7691

DATE: August 26, 2003

SUBJECT: Appellate Procedure: Permit Parties to File Replies to Answers to Petitions for Review Even if those Answers Do Not Raise New Issues (amend Cal. Rules of Court, rules 28(a) and 28.1(d)) (Action Required)

Issue Statement

Rule 28(a)(3) of the California Rules of Court provides that the party who filed a petition for review in the Supreme Court may file a reply to the respondent's answer only if that answer raises additional issues for review. Rule 28.1(d) also specifies that a reply to an answer to a petition for review may address only the new issues for review raised in the answer. In practice, however, replies to answers to petitions for review are routinely filed even if the answer does not raise new issues, and these replies are not rejected by the Supreme Court.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2004, amend rules 28(a) and 28.1(d) to permit parties to file replies to answers to petitions for review even if those answers do not raise new issues.

The text of the amended rules is attached at pages 4-5.

Rationale for Recommendation

In response to a suggestion submitted by the California Academy of Appellate Lawyers, the Appellate Advisory Committee recommends that rules 28 and 28.1 of the California Rules of Court be amended to reflect the California Supreme Court's current practice of allowing replies to answers to petitions for review to be

filed regardless of whether the answers raise new issues. Such replies may prove helpful to the court's understanding of the petition – clarifying the issues raised in that petition or responding to the answer concerning these issues – even when the answer does not raise new issues.

Alternative Actions Considered

As discussed below, the committee considered, but ultimately rejected, the idea of retaining a description of the contents of a reply in rule 28.1.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2003 comment cycle. Five individuals or organizations submitted comments on this proposal. Overall, two commentators agreed with the proposal without suggesting changes, two agreed with the proposal only if modified, one submitted comments but took no position on the proposal, and none disagreed with the proposal.[1]

Two of the commentators, Cheryl Geyerman, Chair of the Appellate Court Committee of the San Diego County Bar Association, and Tina Rasnow, Coordinator at the Superior Court, County of Ventura raised a concern that this proposed change may increase the number of replies filed. While the San Diego Bar committee did not take a position for or against the proposal, it cautioned that if a reply is permitted in every case, many attorneys may feel bound to file a reply, which will waste resources and create additional administrative burdens for the court. Similarly, while Tina Rasnow indicated that she generally agreed with the proposed changes, she noted there was a suggestion that it might be better not to specify that a reply is allowed, but simply permit the court to request additional briefing. The Appellate Advisory Committee agrees that this rule change may result in replies being filed in some additional cases. However, the committee believes that the number of additional replies filed is not likely to be large, as petitioners already routinely file replies even when the answer does not raise new issues, and that it is important that the rules accurately reflect current Supreme Court practice in this area.

Mr. Robert Gerard, President of the Orange County Bar Association, agreed with the proposed amendment to rule 28 permitting a reply to be filed when the answer to a petition for review does not raise new issues. However, he suggested that the proposed amendment to rule 28.1, which eliminates the mention of the content of reply briefs, is illogical given that the rule describes the content of the petition and answer. Subdivision (b) of rule 28.1 does contain a fairly detailed description of the contents of a petition for review. However, subdivision (c), which addresses

[1] The full text of the comments and the committee responses to these comments is set forth on the accompanying comment chart, beginning on page 6.

the contents of answers to petitions for review, does not comprehensively provide for the contents of such answers; it specifies only what must be included in such an answer if that answer raises new issues for review. To respond to Mr. Gerard's comment while maintaining consistency with the approach taken in rule 28.1(c), the committee considered retaining language from rule 28.1(d) specifying that replies must respond to new issues raised in the answer. The committee ultimately rejected this concept, however, because it might create confusion about whether replies are still limited to responding to such new issues.

Implementation Requirements and Costs

As suggested by commentators, implementing this proposal may result in petitioners filing replies to answers to petitions for review in some additional cases, which may result in some additional costs to these petitioners and to the Supreme Court.

Attachments

Rules 28 and 28.1 of the California Rules of Court are amended, effective January 1, 2004, to read:

Rule 28. Petition for review

(a) Right to file a petition, answer, or reply

(1) - (2) * * *

(3) The petitioner may file a reply ~~only if~~ to the answer ~~raises additional issues for review~~.

(b)–(g) * * *

Rule 28.1. Form and contents of petition, answer, and reply

(a)–(c) * * *[2]

~~**(d) Contents of a reply**~~

~~A reply, if any, must be limited to addressing additional issues for review raised in an answer.~~

~~(e)~~(d) Length * * *

~~(f)~~(e) Attachments and incorporation by reference * * *

Advisory Committee Comment ~~(2003)~~ (2004)

New rule 28.1 collects in one rule the provisions of former rule 28 governing the form and content of a petition for review, answer, and reply.

Subdivision (b) * * *

Subdivision ~~(e)~~(d). Subdivision ~~(e)~~(d) states in terms of word counts rather than page counts the maximum permissible lengths of a petition for review, answer, or reply produced on a computer. This substantive change tracks ~~an identical~~ a provision in revised rule 14(c) governing Court of Appeal briefs and is explained in the Advisory Committee Comment to that provision.

[2] Please note that, as part of a separate proposal, the Appellate Advisory Committee is proposing that subdivision (b) of rule 28.1 be amended.

Subdivision ~~(f)~~(e). Paragraphs (1) and (2) of subdivision ~~(f)~~(e) restate and simplify portions of, respectively, the second paragraph of former rule 28(e)(6) and the third paragraph of former rule 28(e)(5). No substantive change is intended.

The first and third paragraphs of former rule 28(e)(5) in effect required parties to include their points, authorities, and arguments in the bodies of their petitions, answers, and replies. New rule 28.1~~(f)~~(e) deletes these provisions as superfluous: the same requirements are imposed by rule 14(a)(1), which is made applicable to petitions, answers, and replies by new rule 28.1(a).

The third paragraph of former rule 28(e)(5) authorized a party to incorporate by reference portions of a petition, answer, and reply filed by another party in the same case or filed by any party in "a connected case" in which a petition for review was pending or had been filed. New rule 28.1~~(f)~~(e)(2) deletes as ambiguous the term "a connected case" and substitutes the more descriptive phrase, "a case that raises the same or similar issues," i.e., irrespective of the identity of the parties. The change is not substantive.

SPR03-02

Appellate Procedure—Allow parties to file replies to answers to petitions for review even if answers do not raise new issues (amend Cal. Rules of court, rules 28(a) and 28.1(d))

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Ms. Gloria Barnes Legal Process Clerk Superior Court of California, County of Santa Cruz	A	N	No comments	No response necessary.
2.	Mr. Saul Bercovitch, State Bar of California Appellate Court Committee	A	Y	The Committee endorses this proposal, which would eliminate the requirement that a reply to an answer to a petition for review in the Supreme Court be filed only in response to new issues raised in the answer. The proposed amendment would conform the rule to the current Supreme Court practice of accepting replies irrespective of whether the answer raises such additional issues.	No response necessary.
3.	Mr. Robert Gerard President Orange County Bar Association	AM	Y	It is agreed that the Reply should be allowed to be filed without any "new issue" requirement; however, while experienced practitioners of appellate law may understand the content requirement (or lack thereof) for all three types of pleadings, the express discussion of the requirements for the content of the Petition and Answer without any mention as to the contents of the Reply in Rule 28 seems illogical. What would be the content limitations for the Reply, if any? The discussion raises the point that the Reply may be helpful understanding the petition. Why not include that type of "content" language?	The committee considered retaining language from rule 28.1(d) specifying that replies must respond to new issues raised in the answer. The committee ultimately rejected this concept, however, because it might create confusion about whether replies are still limited to responding to such new issues.

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4.	Ms. Cheryl A. Geyerman Chair San Diego County Bar Association Appellate Court Committee		N	SPR03-2 proposes modifying rule 28(a)(3) to permit a reply to an answer to a petition for review in all circumstances, not only when the answer raises new issues, as in the current rule. We neither advocate nor oppose this modification. However, we wish to forewarn the Committee of the standard of practice that will certainly result from this change. The Committee observes that, despite the current rule, "replies to petitions for review are routinely filed even if the answer does not raise new issues." While we agree replies are filed in circumstances inappropriate under the current rule, we do not see this practice as universal or even as widespread as the Committee suggest. Many experienced and dedicated appellate practitioners comply with the current rule and elect not to file a reply where the answer does not raise new issues. These practitioners are not concerned that court personnel view this as counsel's lack of confidence in the petition's merits because a reply in that instance, despite contrary practice by some, it simply prohibited by the current rule. The proposed modification will change that, however. If a reply is permitted in every instance, many attorneys may feel bound to file a reply in every instance. Attorney may be concerned that court personnel will become accustomed to receiving replies and, knowing replies are permitted, will view the failure to file a reply as reflecting counsel's lack of confidence in the petition's merits. Even the sophisticated appellate practitioner may feel compelled to file a reply in circumstances where the answer does not necessarily warrant further analysis.	The committee believes that the number of additional replies filed is not likely to be large and that it is important that the rules accurately reflect current Supreme Court practice in this area. The committee also believes that a reply may prove helpful to the Court's understanding of the petition even when the answer does not raise new issues

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5.	Tina Rasnow Coordinator Superior Court of California, County of Ventura	AM	N	We generally agree with the proposed changes, except there was some concern that it may be better not to change the rule to specify that a reply to the petition is allowed. The concern is that the court can always request further briefing on an issue, but that it rarely needs a reply, there usually being more than adequate information in the petition, opposition, and the record itself. Specifically allowing for a reply may cause more unnecessary pleadings to be filed, wasting paper and time all around, because lawyers feel they should reply because the rule specifically allow them to.	See response to the comments of Ms. Cheryl A. Geyerman above.